



THE  
**PEW**  
CHARITABLE TRUSTS

October 24, 2012

*Via Regular Mail and Electronic Mail to:*

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
E-mail: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

**Re: Freedom of Information Act Request for Records Related to EPA's Ability to  
Protect the Public from Concentrated Animal Feeding Operations' Pollution**

To Whom It May Concern:

On behalf of the Natural Resources Defense Council ("NRDC") and the Pew Charitable Trusts, we write to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"),<sup>1</sup> and the Environmental Protection Agency ("EPA") FOIA regulations.<sup>2</sup>

NRDC is comprised of more than 1.3 million members and online activists and over 350 lawyers, scientists, and advocates who are committed to protecting our natural resources for health and future generations. This includes protecting our nation's water supply from pollution caused by animal agriculture.

The Pew Charitable Trusts' Campaign to Reform Industrial Animal Agriculture is dedicated to advancing pollution control policies to mitigate waste from animal agriculture and create a new system that is less damaging to the environment, rural communities and human health.

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> 40 C.F.R. 2.100 ff.

## **1. Description of Records Sought**

NRDC and the Pew Charitable Trusts ask that EPA please produce all records<sup>3</sup> in EPA's possession, custody or control relating to EPA's withdrawal of the proposed National Pollutant Discharge Elimination System ("NPDES") Concentrated Animal Feeding Operation ("CAFO") Reporting Rule ("Reporting Rule").<sup>4</sup>

These records should include, without limitation:

1. Any records pertaining to the Reporting Rule that are not contained in the public docket for that rule that were submitted to EPA by: The American Farm Bureau Federation, The National Pork Producers Council, The National Cattlemen's Beef Association, The United Egg Producers, The U.S. Poultry & Egg Association, The National Council of Farmer Cooperatives, The National Milk Producers Federation, The National Chicken Council, the National Turkey Federation, The National Corn Growers Association, or any other agricultural trade association.
2. Any records providing factual information concerning the completeness, accuracy, and public accessibility of states' CAFO information in the following areas:
  - a. The legal name of the owner of the CAFO or an authorized representative, their mailing address, email address, and primary telephone number.
  - b. The legal name and address of the CAFO owner/operator, if the name and address of an authorized representative is provided above,
  - c. The location of the CAFO's production area, identified by latitude and longitude and street address,
  - d. If the owner or operator has NPDES permit coverage, the date of issuance of coverage under the NPDES permit, and the permit number,
  - e. For the previous 12-month period, identification of each animal type confined either in open confinement including partially covered area, or housed totally under roof at the CAFO for 45 days or more, and the maximum number of each animal type confined at the CAFO for 45 days or more,
  - f. Where the owner or operator land applies manure, litter, and process wastewater, the total number of acres under the control of the owner or operator available for land application,
  - g. If the CAFO is a contract operation, the name and address of the integrator,

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<sup>3</sup> The term "records" is used herein to mean anything denoted by the use of that word or its singular form in the text of FOIA. In particular, the term includes, but is not limited to, all writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored) including, but not limited to, correspondence, minutes of meetings, memoranda, notes, e-mails, notices, facsimiles, charts, tables, presentations, orders and filings.

<sup>4</sup> National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 76 Fed. Reg. 65,431 (Oct. 21, 2011) (Docket No. EPA-HQ-OW-2011-0188) [hereinafter *CAFO Reporting Rule*].



- h. Type and capacity of manure storage used at the CAFO,
  - i. Quantity of manure, process wastewater, and litter generated annually by the CAFO,
  - j. If the CAFO land-applies, whether it implements a nutrient management plan for land application,
  - k. If the CAFO land-applies, whether it employs nutrient management practices and keeps records on site consistent with 40 CFR 122.23(e),
  - l. If the CAFO does not land apply, alternative uses of manure, litter and/or wastewater, and
  - m. Whether the CAFO transfers manure off site, and if so, the quantity transferred to recipient(s) of transferred manure.
3. Any records that provide any of items 2.a-m, above, for any CAFO in the U.S.

## **II. Request for Fee Waiver**

NRDC and the Pew Charitable Trusts request that EPA waive the fee that it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be furnished without any charge or at a reduced charge if A) "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operation or activities of the government," and B) "is not primarily in the commercial interest of the requester."<sup>5</sup> The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as a "representative of the news media" entitled to a reduction of fees under FOIA.<sup>6</sup>

### **A. Disclosure is in the Public Interest and would Contribute Significantly to Public Understanding of the Operations of the Government**

FOIA dictates that a fee waiver should be granted when a disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government."<sup>7</sup> The records described above shed light on a matter of considerable public interest and concern: the extent to which EPA has the capacity to effectively mitigate water pollution from CAFOs.

As EPA pointed out in the proposed Reporting Rule, "pollutants from manure, litter, and process wastewater can affect human health and the environment."<sup>8</sup> EPA noted that "despite more than 35 years of regulating CAFOS, reports of water quality impacts from large animal feeding

<sup>5</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 40 CFR 2.107(l).

<sup>6</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 CFR 2.107(d).

<sup>7</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 40 CFR 2.107(l).

<sup>8</sup> CAFO Reporting Rule, *supra* note 4, at 65,433.

operations persist.”<sup>9</sup> Pollutants commonly found in CAFO waste include nutrients, pathogens, heavy metals, and pharmaceuticals.<sup>10</sup> These pollutants cause toxic algal blooms, human disease, and human reproductive problems.<sup>11</sup> It is of great public concern that waste containing these pollutants is effectively managed and contamination of water resources is avoided.

The Government Accountability Office recommended in a 2008 report to Congress that EPA “should complete the Agency’s effort to develop a national inventory of permitted CAFOs” because “EPA has neither the information it needs to assess the extent to which CAFOs may be contributing to water pollution, nor the information it needs to ensure compliance with the Clean Water Act.”<sup>12</sup> EPA withdrew the Reporting Rule, which would have gathered information EPA needs to perform its duty of protecting public health and water quality. It is therefore in the public interest to determine what “operations or activities” the EPA plans to use to deal with the staggering lack of information about CAFOs and the persistent pollution affiliated with these facilities.

The tailored request in this letter seeks disclosure of important records concerning EPA’s activities that will contribute meaningfully and significantly to public understanding of CAFO pollution. Disclosure of these records will contribute “significantly” to public understanding because NRDC and the Pew Charitable Trusts will disseminate summary and analysis of any newsworthy information conveyed in the requested records.

As a not for profit organization, the Pew Charitable Trusts is well-equipped to analyze and disseminate the requested information, and may use this information to contribute to the public’s understanding of the EPA’s withdrawal of the proposed NPDES CAFO Reporting Rule. The Pew Charitable Trusts could disseminate that information in a number of ways including through the Pew Charitable Trusts’ website, <http://www.pewtrusts.org>, Pew Environment Group’s website, <http://www.pewenvironment.org>, and its publication *The Latest*, which has a circulation of nearly 120,000 people. In addition, it could distribute the information through the state and national media by way of press releases or other media for general public consumption.

NRDC publishes information in its magazine, *OnEarth*, which is distributed to over 150,000 subscribers, for sale to newsstands and bookstores, and free of charge at <http://www.nrdc.org/onearth>. NRDC also has the ability to disseminate information on CAFO pollution through its website, <http://www.nrdc.org>, which is updated daily and draws approximately 2.5 million page views and 700,000 visits per month; its *Nature’s Voice* newsletter on current environmental issues, distributed five times a year to NRDC’s

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<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> U.S. Gov’t Accountability Office, *Concentrated Animal Feeding Operations: EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality*, GAO-08-944 5 (2008), page 48.



approximately 650,000 members and online at <http://www.nrdc.org/naturesvoice/>, and other newsletters and alerts. NRDC's *Earth Action* email list has more than 165,000 subscribers who receive biweekly information on urgent environmental issues. This information is also made available through NRDC's online Action Center at <http://www.nrdc.org/legislation/legwatch.asp>. *This Green Life* is an electronic newsletter on environmentally sustainable living distributed by email to 55,000 subscribers and made available online at <http://www.nrdc.org/thisgreenlife/>. NRDC issues press releases; participates in press conferences and interviews with reporters and editorial writers; and has over twenty staff members dedicated to communications work.<sup>13</sup> Finally, NRDC employees provide Congressional testimony, appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books.<sup>14</sup>

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

1. NRDC obtained through a court-enforced FOIA request records of the operations of Bush Administration's Energy Task Force, headed by Vice President Dick Cheney. It made those records available, along with analysis of selected excerpts and links to the administration's index of withheld documents, on NRDC's website at <http://www.nrdc.org/air/energy/taskforce/tfinx.asp>. NRDC's efforts helped to inform the public about an issue that, even before the records' release, had attracted considerable attention.<sup>15</sup>
2. NRDC obtained through a FOIA request a memorandum by ExxonMobil advocating the replacement of a highly respected atmospheric scientist, Dr. Robert Watson, as the head of the Intergovernmental Panel on Climate Change. NRDC used this memorandum to

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<sup>13</sup> See "Communications" staff list at <http://www.nrdc.org/about/staff.asp>.

<sup>14</sup> See, e.g., Tammy Weber, *EPA Can't Regulate Livestock Farms it Can't Find*, Huffington Post, [http://www.huffingtonpost.com/2012/08/02/epa-cant-regulate-livestock\\_n\\_1732414.html](http://www.huffingtonpost.com/2012/08/02/epa-cant-regulate-livestock_n_1732414.html) (Aug. 2, 2012) (quoting NRDC Senior Attorney Jon Devine); Kristin Eberhard and Evan Gillespie, "How LADWP can do right by Angelenos," Op-Ed, L.A. Times (Sept. 11, 2012) (co-authored by NRDC Western Energy and Climate Program Legal Director Kristin Eberhard); Alice Park, "Waste Not," Time Magazine (Sept. 10, 2012) (quoting NRDC Senior Scientist Allen Hershkowitz); Steve Scher, "Food: Why Americans Waste So Much and Ways to Stop," KOUW (Seattle Public Radio), Aug. 30, 2012 (featuring NRDC Scientist Dana Gunders); "Weighing Benefits and Pitfalls of Increased Oil and Gas Production in the U.S.," PBS NewsHour, Aug. 10, 2012 (featuring NRDC Senior Attorney Kate Sinding); "Clean Air in California: What's it Going to Take?" 2012 Environmental Law Conference at Yosemite, Oct. 28, 2012 (featuring NRDC Attorney Adrian Martinez).

<sup>15</sup> See, e.g., Elizabeth Shogren, *Bush Gets One-Two Punch on Energy*, L.A. Times (Mar. 28, 2002), at A22; Bennett Roth, *Houston Energy-Drilling Firm Appears in Documents from Energy Department*, Houston Chronicle (Apr. 12, 2002).

help inform the public about what may have been behind the decision by the Bush Administration to replace Dr. Watson.<sup>16</sup>

3. NRDC incorporated information obtained through FOIA into a 2005 report, published and provided free of charge at NRDC's website,<sup>17</sup> on the impacts of military sonar and other industrial noise pollution on marine life.<sup>18</sup>

Disclosure of the requested documents is "likely to contribute significantly to public understanding" of EPA's activities concerning CAFO pollution<sup>19</sup> because NRDC intends to disseminate any newsworthy information in the released records, and its analysis of such records, to its member base and to the broader public, through one or more of the many communications channels referenced above. As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

**B. NRDC and the Pew Charitable Trusts have no Commercial Interest that would be Furthered by the Requested Information**

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request<sup>20</sup> because "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"<sup>21</sup> NRDC and the Pew Charitable Trusts are not-for-profit organizations and, as such, have no commercial interest.

NRDC's and the Pew Charitable Trusts' primary interest in obtaining the above records is to serve the public by disclosing presently non-public information about EPA's ability to protect the public from CAFO pollution. As previously discussed, CAFOs are a significant source of water pollution, and waste from CAFOs contains substances that are hazardous to humans and the environment. Because CAFOs are potentially so harmful to human health and natural places, it is in the public interest to examine how EPA plans to protect against the harmful effects of CAFO pollution.

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<sup>16</sup> See NRDC Press Release and Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," (Apr. 3, 2002); Elizabeth Shogren, *Charges Fly Over Science Panel Pick*, L.A. Times (Apr. 4, 2002).

<sup>17</sup> See <http://www.nrdc.org/wildlife/marine/sound/contents.asp>.

<sup>18</sup> See NRDC, *Sounding the Depths II* (Nov. 2005) (update to a 1999 report). Since the report's publication, the sonar issue has continued to attract widespread public attention. See, e.g., D. Fleshler, "Navy testing could devastate whales and dolphins, groups say," Ft. Lauderdale Sun Sentinel, July 13, 2012.

<sup>19</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>20</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 40 CFR 2.107(l)(3).

<sup>21</sup> *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted).



### C. NRDC is a Media Requester

Even if EPA denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA.<sup>22</sup> As described previously in this request, NRDC publishes a quarterly magazine, *OnEarth*, which has more than 150,000 subscribers and is available at newsstands and bookstores; publishes a periodic newsletter for its more than 650,000 members nationally; issues regular electronic newsletters, action alerts, public reports and analyses; and maintains a free online library of reports and analyses. These publications routinely include information about current events of interest to the readership and the public. NRDC staff members are also regular contributors to numerous periodicals, books, and the NRDC Switchboard blog, <http://www.switchboard.nrdc.org/>; television, radio, and web programs; and hearings and conferences. CAFO pollution specifically has been featured in some of NRDC's media outlets.<sup>23</sup> As previously noted, information obtained as a result of this request will, if appropriately newsworthy, be disseminated through one or more of NRDC's publications or other suitable channels.

### III. Willingness to Pay Fees Under Protest

Please provide the records above irrespective of the status and outcome of your evaluation of NRDC's and the Pew Charitable Trusts' fee category assertion and fee waiver request. In order to prevent delay in EPA's provision of the requested records, NRDC and the Pew Charitable Trusts state that they will, if necessary and under protest, pay fees in accordance with 40 CFR 2.107. Please consult with me, however, before undertaking any action that would cause the fee to exceed \$500. Such payment will not constitute any waiver of NRDC's and the Pew Charitable Trusts' right to seek administrative or judicial review of any denial of its fee waiver request and/or rejection of its fee category assertion.

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<sup>22</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 40 CFR 2.107(d).

<sup>23</sup> See, e.g., Posting of Jon Devine to NRDC Switchboard Blog, *EPA Chickens Out by Dropping Industrial Livestock Information Collection Effort*, (July 24, 2012), [http://switchboard.nrdc.org/blogs/jdevine/epa\\_chickens\\_out\\_by\\_dropping\\_i.html](http://switchboard.nrdc.org/blogs/jdevine/epa_chickens_out_by_dropping_i.html); Dan Rosen, *Cow Woes*, *OnEarth Magazine* (Aug. 26, 2012), available at <http://www.onearth.org/article/cow-woes>.

#### IV. Conclusion

We trust that, in responding to this request, EPA will comply with all relevant deadlines and other obligations set forth in FOIA and EPA's regulations.<sup>24</sup>

To the extent that the requested records are available in a readily accessible electronic format, we would prefer to receive documents electronically, either by email or on a CD. If electronic copies are unavailable, we will accept paper copies. Please send records to Jon Devine at [jdevine@nrdc.org](mailto:jdevine@nrdc.org), or mail them to:

Jon Devine  
NRDC  
1152 15<sup>th</sup> Street NW, Suite 300  
Washington, DC 20005

Please produce records on a rolling basis; at no point should EPA's search for or deliberations concerning certain records delay the production of others that EPA has already retrieved and is obliged to produce.

In the event that EPA concludes that some of the records requested above may already be publicly available, we will be happy to discuss those conclusions in an effort to narrow the scope of this request.

Thank you for your prompt attention to this request.

Sincerely,



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<sup>24</sup> See 5 U.S.C. § 552; 40 CFR 2.100 ff.





**EARTHJUSTICE**

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES  
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

**RECEIVED**  
SEP 12 2012

September 11, 2012

By Email: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
(202) 566-1667 FAX (202) 566-2147  
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Re: Freedom of Information Request for information related to the withdrawal of the  
CAFO Reporting Rule

Dear Freedom of Information Officer:

Earthjustice submits this request for records in accordance with the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. In accordance with FOIA, please provide us with the following records relating to the rule proposed by the Environmental Protection Agency ("EPA") on October 21, 2011, under section 308 of the Clean Water Act, to collect information about concentrated animal feeding operations (CAFOs) (the "CAFO Reporting Rule"), and the withdrawal of the CAFO Reporting Rule announced by EPA on July 20, 2012:

1. All records, including all communications, shared or otherwise maintained between EPA and any other governmental agency (including, but not limited to, the United States Department of Agriculture and/or the United States Geological Survey) relating to the CAFO Reporting Rule and/or the 2012 withdrawal of the CAFO Reporting Rule ;
2. All records reflecting any communication, written or verbal, between the EPA and any private party, corporation or non-profit organization (including, but not limited to, the National Pork Producers Council, the American Farm Bureau Federation, the National Chicken Council, the U.S. Poultry & Egg Association, and the National Milk Producer's Federation) relating to the CAFO Reporting Rule and/or the 2012 withdrawal of the CAFO Reporting Rule;
3. All records created or updated since November 28, 2008, relating to EPA's evaluation of information publicly available about CAFOs in the United States.
4. All records, including, but not limited to, all communications and records identifying, discussing, mentioning, describing, reporting or analyzing, the July 2012 memorandum of understanding (MOU) entitled "Collaborative Efforts to Collect and

Exchange Information about Concentrated Animal Feeding Operations" entered into between EPA and the Association of Clean Water Administrators;

5. All records relating to how EPA will obtain information about CAFOs in states for which current site-specific information about CAFOs is not available on the internet, including, at a minimum, CAFOs in Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, Puerto Rico, U.S. Virgin Islands, West Virginia, Georgia, Illinois, Minnesota, Kansas, Nevada, Alaska, Idaho, and Washington;
6. All records relating to and/or identifying existing sources of information about CAFOs, including the AFOs themselves, and EPA's proposed and intended data collection process for gathering that information.

The use of the word "record" above includes, but is not limited to, documents in all forms (including electronic), information, emails, faxes, letters, comments, reports, summaries of telephone conversations, handwritten notes, meeting minutes, or any other materials. **EPA need not produce documents that are part of the docket for the CAFO Reporting Rule (Docket EPA-HQ-QW-2011-0188) as posted on Regulations.gov.**

The use of the word "unredacted" above means that we are seeking full disclosure of all information in the requested record. In the event that you determine that you can disclose only some of the information contained in a record that falls within the scope of this request, please provide us with a copy of the record with only the information that you have determined to be properly treated as confidential redacted.

If any information requested herein was, but is no longer, in EPA's possession or subject to its control, state whether it is (a) missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) otherwise disposed of, and in each instance, explain the circumstances surrounding and authorization for such disposition of it and state the date or approximate date of it.

If you claim that any of the foregoing information is exempt from mandatory disclosure, we respectfully request that you:

- (1) Provide an index of all documents containing the requested information, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
- (2) State the exemption you deem to be applicable to each information request;
- (3) State with particularity the reason why such exemption is applicable to each information request;
- (4) Examine each information request to determine if reasonably segregable non-exempt information exists which may be released after redacting information deemed to be exempt; and
- (5) Exercise your discretion to release such records notwithstanding the availability of a basis for withholding.

#### FEE WAIVER REQUEST

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), we request a fee waiver because "disclosure of the requested information is in the public interest because it is likely to contribute significantly to



public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* As demonstrated below, each of the four factors related to the first fee waiver requirement, as specified in EPA’s FOIA regulations at 40 C.F.R. § 2.107(l)(2)(i)-(iv), weigh in favor of granting our fee waiver request.

***Factor 1: The Requested Records Concern the Operations or Activities of the Federal Government.***

The subject matter of the requested records concerns “identifiable operations or activities of the Federal government,” 40 C.F.R. § 2.107(l)(2)(i), insofar as the requests relate to EPA’s proposal to promulgate the CAFO Reporting Rule and its subsequent decision to withdraw its proposal to promulgate such a rule.

***Factor 2: Disclosure of the Requested Records is Likely to Contribute to Public Understanding of Government Operations or Activities.***

Disclosure of the requested records is “likely to contribute” to an “increased public understanding,” 40 C.F.R. § 2.107(l)(2)(ii), of government operations or activities because such disclosure will enable the requester to understand why EPA decided to withdraw the CAFO Reporting Rule, and how EPA expects to be able to develop facility-specific information about all the CAFOs in the United States, including facility location and basic operational characteristics that relate to how and why a facility may discharge, without requiring CAFOs to report this information to EPA. This information is not already accessible through EPA’s website. See Factor 4, below.

***Factor 3: Disclosure of the Requested Records Will Contribute to the Understanding of a Broad Audience of Persons Interested in How the Government Decided Not to Require CAFOs to Report and in How the Government Will Identify CAFOs that Are Discharging, But Are Not in the NPDES Program***

Disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in” learning about the Government’s efforts to regulate CAFOs under the Clean Water Act, and how EPA can comply with its mandates under the Clean Water Act without gathering the information it would have received under the CAFO Reporting Rule. This is because Earthjustice, the requesting organization, is a national nonprofit environmental law firm which has made safeguarding the environment, including especially the nation’s waters, one of its top priorities and has developed expertise in this area. In order to further its work to protect the nation’s waters, Earthjustice has brought numerous lawsuits seeking to enforce the Clean Water Act, and filed several Clean Water Act petitions with EPA. See, e.g., *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009) (counsel of record for respondents Southeast Alaska Conservation Council, et al. in case involving the discharge of wastewater into Lower Slate Lake); *Friends of Everglades v. South Florida Water Management Dist.*, 570 F.3d 1210 (11th Cir. 2009) (representing plaintiffs in case involving pumping of polluted water into Lake Okeechobee); *Petition under the Clean Water Act to Establish Toxicity Criteria and Require Toxicity Testing and Public Disclosure of Ingredients for Products on the National Contingency Plan Product Schedule* (Oct. 13, 2010),



[http://earthjustice.org/sites/default/files/files/dispersant\\_petition\\_0.pdf](http://earthjustice.org/sites/default/files/files/dispersant_petition_0.pdf). In addition, Earthjustice has filed or intervened in several lawsuits involving pollution emanating from CAFOs. *See, e.g., Waterkeeper Alliance v. EPA*, No. 09-1017 (D.C. Cir. Jan. 15, 2009) (representing petitioners in challenge to regulations exempting from reporting air releases of hazardous substances from animal waste at farms); *Rose Acre Farms, Inc. v. NC Department of Environment and Natural Resources*, No. 12-CVS-10 (Super. Ct. Hyde Cty March 2, 2012) (representing intervenors on side of State agency defending decision to require egg CAFO to operate under NPDES permit). Because of our expertise in this area, Earthjustice is well-prepared to analyze and evaluate the records we receive pursuant to this request and assess them in the context of the statutory mandates of the Clean Water Act and the information already available to EPA about CAFOs, and determine whether EPA's can fulfill its Clean Water Act obligations with respect to CAFOs in light of the decision to withdraw the CAFO Reporting Rule.

In addition to being able to analyze the information provided to determine whether EPA's actions can be reconciled with its obligations under the Clean Water Act, Earthjustice has the "ability and intention to convey this information to the public." 40 C.F.R. § 2.107(l)(2)(iii). Earthjustice can publicize information received from this request – and its analysis of whether the withdrawal of the CAFO Reporting Rule is consistent with the EPA's Clean Water Act's mandates -- in its monthly electronic newsletter, which serves approximately 223,000 subscribers. Earthjustice also can utilize its online action alert system to urge members of the public to contact policymakers and ask them to take action based on information received from this request; typically, 15,000 to 20,000 individuals respond to such alerts. Finally, Earthjustice's full-time health campaigner can disseminate newsworthy information obtained from this request to the media, and Earthjustice's full-time health lobbyist can provide relevant information obtained from this request to elected officials in Washington..

***Factor 4: The Contribution to Public Understanding of Government Operations or Activities Will Be Significant.***

The public's understanding of government operations or activities related to EPA's knowledge of pollution caused by CAFOs and whether EPA has an adequate plan for determining which CAFOs are discharging pollutants into waters of the United States, "as compared to the level of public understanding existing prior to disclosure, [will] be enhanced by the disclosure to a significant extent." 40 C.F.R. § 2.107(l)(2)(iv). Because so little is publicly known or understood about EPA's plan for learning about, and addressing, discharges from CAFOs in the absence of the CAFO Reporting Rule, public understanding of these efforts will undoubtedly be enhanced to a significant extent by disclosures in response to this request.

In addition, the second fee waiver requirement – that the request "is not primarily in the commercial interest of the requester," 40 C.F.R. § 2.107(l)(1) – is also met here. The requester, Earthjustice, is a 501(c)(3) nonprofit organization and does not have any "commercial interest that would be furthered by the requested disclosure" of information.<sup>1</sup> 40 C.F.R. § 2.107(l)(3)(i).

<sup>1</sup> Indeed, the legislative history of the fee waiver provision reveals that it was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests," in particular those from journalists, scholars and nonprofit public interest groups. *See Entlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984).



Indeed, Requester's sole interest in obtaining the requested information is to broaden public understanding of why EPA withdrew the CAFO Reporting Rule, and whether EPA has a reasonable plan in place to learn about which CAFOs are likely discharging, and to undertake advocacy efforts related to improving EPA's regulation of CAFOs under the Clean Water Act, if appropriate.

In sum, this request meets the requirements for a fee waiver. In the event that fees are not waived, please notify and inform us of the basis for your decision.

#### INSTRUCTIONS FOR RECORD DELIVERY

To the extent that the requested records are available in a readily accessible electronic format, we would prefer to receive the documents electronically, either by email or on a CD. If electronic copies are unavailable, we will accept paper copies. Please send records to Eve C. Gartner at [egartner@earthjustice.org](mailto:egartner@earthjustice.org), or mail them to:

Eve C. Gartner, Esq.  
Earthjustice  
156 William St., Suite 800  
New York, NY 10038-5326

As FOIA requires, we expect your response within twenty working days of your receipt of this request. In the event that you have any questions concerning the type of materials we are interested in receiving, please contact me by email or by telephone at 212-791-1881 ext. 8222.

Thank you for your assistance in this matter.

Sincerely,



Eve C. Gartner

RECEIVED  
SEP 12 2012



new FOIA request  
Eve C. Gartner to: FOIA HQ

09/12/2012 10:07 AM

Dear Sir or Madam –

Attached please find a FOIA request related to the withdrawal by EPA of the CAFO Reporting Rule announced on July 20, 2012.

Many thanks for your attention to this matter.

Eve Gartner

Eve C. Gartner  
Staff Attorney  
Earthjustice  
156 William Street  
Suite 800  
New York, New York 10038  
T: 212-791-1881 ext. 8222  
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Because the earth needs a good lawyer

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FOIA to EPA - Withdrawal of Reporting Rule-final.pdf





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

September 12, 2012

Ms. Eve Gartner  
Earthjustice  
156 William Street  
Suite 800  
New York, NY 10038-5326

RE: Request No: HQ-FOI-01980-12

Dear Ms. Gartner,

This is to acknowledge receipt of your Freedom of Information Act (FOIA), 5 U.S.C. 552, request dated September 12, 2012 and received in this office on September 12, 2012, for records related to:

Requesting a copy of records related to the CAFO Reporting Rule and the withdrawal of the CAFO Reporting Rule announced on July 20, 2012.

Your request has been forwarded to OW for processing. If you have any questions, please contact the Requester Service Center at 202-566-1667 or by email at [hq.foia@epa.gov](mailto:hq.foia@epa.gov). Please provide your FOIA request number in all communications. You can obtain the status of your initial FOIA request on-line at [http://www.epa.gov/foia/foia\\_request\\_status.html](http://www.epa.gov/foia/foia_request_status.html)

Sincerely,

Larry F. Gottesman  
National FOIA Officer

**FREEDOM OF INFORMATION ACT REQUEST  
HQ-FOI-01980-12**

**REQUESTER:** Eve Gartner

**Request Date:** September 12, 2012

**COMPANY:** Earthjustice

**Received Date:** September 12, 2012

**FEE Category:** Other

**Subject:** Requesting a copy of records related to the CAFO Reporting Rule and the withdrawal of the CAFO Reporting Rule announced on July 20, 2012.

**Due Date:** October 11, 2012

**ASSIGNMENTS:**

OW

**SPECIAL INSTRUCTIONS:**

**Fee Waiver requested.**

**Please e-mail Vivian Warden regarding if it seems that this will exceed \$14.00, or not. If you would like to provide input regarding this determination please e-mail me.**

FS: vw